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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1498

REESE HUBBARD,

Petitioner,

vs.

DONNA M. KIEFEL,

Respondent.

REPLY BRIEF FOR PETITIONER, REESE HUBBARD.

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(Answering pp. 1-2.)

It is true that certiorari was denied at an interlocutory stage of these proceedings in 1969. But certiorari may have been denied because of the interlocutory character of these proceedings. This Court has often denied certiorari at an interlocutory stage, and then later granted it to review the entire proceedings, when ultimately there was a final judgment. See *e.g., Burnet* v. *J. Rodgers Flannery & Co.,* 286 U. S. 524, 52 S. Ct. 497, 76 L. Ed. 1268, *reversing* 3 Cir., 54 F. 2d 365; *Mercer* v. *Theriot,* 377 U. S. 152, 153-154, 12 L. Ed. 206, 208; *Stern & Gressman,* Supreme Court Practice (4th Ed. 1967), p. 27.

Indeed, in *Burnet,* the Court denied certiorari after the first appeal (282 U. S. 889, 51 S. Ct. 102, 75 L. Ed. 784). After the second appeal, this Court granted certiorari and summarily reversed both judgments of the Court of Ap-

peals (286 U. S. 524, 52 S. Ct. 497, 76 L. Ed. 1268). In so acting, this Court followed the very course which is appropriate in the decision at bar.

Further, there are new issues on this petition for certiorari. Our first ground for granting the writ (Petition, pp. 13-17), towit, the necessity of an "impartial court," having the "impersonal authority of law", arises out of this Court's very recent decision in *Mayberry* v. *State of Pennsylvania,* No. 121, 91 S. Ct. 499, 39 L. W. 4133 (1/20/1971).

Respondent's narrow restriction of that authority to contempt cases with 22 year prison sentences (Brief, pp. 2, 10-12) ignores the all-important constitutional principle of that decision. (Petition, pp. 13-17)

Similarly, our reason 4 (Petition, pp. 27-28) arises out of a judgment for $4,000 in attorneys' fees which was not entered until after this Court's denial of our earlier petition.

QUESTIONS PRESENTED.

(Answering pp. 2-4.)

The issues are correctly stated in the petition at pp. 2-4.

The principal charges of misconduct turn on evidence of events which took place outside the "actual presence," or the personal observation of the court, namely, in Las Vegas, Nevada.

The attempt to justify these summary proceedings, and thereby avoid the constitutional requirements of procedural due process, on the basis of the "personal observation of the court" exception utterly fails. If left to stand, the instant opinion would make a nullity of the fundamental constitutional requirements of confrontation, cross-examination, and an "evidentiary hearing" as to disputed factual issues before a court having the "impartial authority of law."

Such important constitutional rights can not turn on whether the proceeding is named "costs," rather than "contempt."

18 U. S. C., § 1927 was never intended to effect such a novel and unprecedented result.

STATEMENT OF THE CASE.

(Answering pp. 4-5.)

The pertinent facts are stated in the petition at pp. 4-5.

The petition omits to state (p. 4) that Judge Robson granted a new trial on February 28, 1966, and at that time, disqualified himself from proceeding further in the case. (A. 79) Only months later, on June 13, 1966, did plaintiff file her petition for costs and attorneys' fees. (A. 81) Hubbard promptly moved on July 5, 1966 that Judge Robson not hear this phase of the case. (A. 79) Judge Robson, on July 12, 1966, denied Hubbard's motion, and reentered the case for the limited purpose of granting plaintiff's petition. (A. 80)

Hubbard denied the charges against him, and demanded the right to confront and cross-examine his accusers, and to present corroborative evidence. (A. 82-83)

These requests were denied and judgment was entered summarily. (A. 83) The only evidentiary hearing had was on the amount of the judgment to be entered.

On October 24, 1966 the Court entered a judgment against Hubbard and his client for $6,100 in attorneys' fees and $2,071.56 as "costs." (A. 11-18)

On appeal the judgments were reversed in their entirety as to the client. The judgment for $6,100 in attorneys' fees against Hubbard, the lawyer, was reversed in its entirety. (A. 32) The judgment for "costs" against him was then reduced by $330.36, to a sum of $1,741.20.

The Court of Appeals then sought to restore some of the $6.430.36 cut from the judgment by awarding him $1,860.60 in printing costs. (A. 46) Further, the court made an un-

solicited remand of the case to the trial court to assess attorneys' fees in a sum not to exceed one-third of plaintiff's costs on appeal. (A. 33-34) On remand a judgment of $4,000 in attorneys' fees was entered against Hubbard, the petitioner. (A. 46-46a)

The reference (pp. 3, 4) to unproven charges from the second trial is improper for the reasons stated in the Petition at pp. 24-27.

The charges are analyzed and shown to be without merit at pp. A. III 53-61. (The reference A. III is to our Appendix [white] filed in the Court of Appeals on the second appeal: that document has been certified and filed as a part of the record herein.)

REASONS FOR GRANTING THE WRIT.

(Answering pp. 6-10.)

See pp. 1-2, *supra.* Of course, there is an overlapping of issues between the first and second petitions for certiorari. This is always true when there has been an unsuccessful attempt to obtain certiorari at an interlocutory stage. But, the very lack of finality of the judgment at that stage may have prompted denial of the writ. As noted above, p. 1, this Court has frequently denied review at an interlocutory stage only to grant it later, when the decision is final. *Burnet* v. *J. Rodgers Flannery & Co.,* 286 U. S. 524, 52 S. Ct. 497, 76 L. Ed. 1268, *reversing* 3 Cir., 54 F. 2d 365; *Mercer* v. *Theriot,* 377 U. S. 152, 153-154, 12 L. Ed. 206, 208; *Stern & Gressman,* Supreme Court Practice (4th Ed. 1967), p. 27.

The attempted reference (p. 7) to events occurring at the second trial is improper. (Petition, pp. 3-7) Hubbard did not attempt to "slip" anything into the jury room.* The charge is without foundation, and is simply an improper attempt to prejudice the Court against petitioner. It essays that very same type of change of theory of the case at the review level which was condemned in *Gregory* v. *City of Chicago,* 394 U. S. 111, 89 S. Ct. 946, 22 L. Ed. 2d 734.

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* For full discussion of these charges see A. III 56-61 (included as part of the record).

ARGUMENT.

PETITIONER HAD A RIGHT TO AN EVIDENTIARY HEARING BEFORE A DIFFERENT COURT AS TO ALL DISPUTED FACTUAL ISSUES.

(Answering pp. 10-12).

Petitioner's constitutional right to see and confront witnesses on the contradicted factual issues and to present opposing witnesses is fully established by the authorities cited in the petition, pp. 17-24. *Willner* v. *Committee on Character & Fitness,* 373 U. S. 96, 103, 105, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 229, 231 (1963); *In re Oliver,* 333 U. S. 257, 259, 273, 275, 92 L. Ed. 682, 694, 695 (1948); *Greene* v. *McElroy,* 360 U. S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959). See also *Berger* v. *Calif.,* 393 U. S. 314, 21 L. Ed. 2d 508, 89 S. Ct. 540, 541 (1969); *Barber* v. *Page,* 390 U. S. 719, 721, 88 S. Ct. 1318, 1320, 20 L. Ed. 2d 255 (1969); *Pointer* v. *Texas,* 380 U. S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965); *Holt* v. *Virginia,* 381 U. S. 131, 14 L. Ed. 2d 290, 85 S. Ct. 1375 (1965); *In re Ruffalo,* 390 U. S. 544, 20 L. Ed. 117 (1968); *In re Murchison,* 349 U. S. 133, 99 L. Ed. 942, 75 S. Ct. 623. See also *Brotherhood of Loc. Fire & Eng.* v. *Bangor & Aroostock R. Co.,* 380 F. 2d 570, 581 (D. C. Cir. 1967).

This right is not limited to criminal cases, or contempt cases. But, it extends to any situation "where a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him. * * * " *Wisconsin* v. *Constantineau,* No. 95, 91 S. Ct. 507, 39 L. W. 4128 (Jan. 29, 1971) (posting as a drunk); *Sniadich* v. *Family Finance Co.,* 395 U. S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969) (pre-judgment garnishment); *Goldberg* v.

Kelly, 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1969) (termination of welfare payments). See also *Breen* v. *Selective Service Board,* 396 U. S. 468, 24 L. Ed. 2d 653, 90 S. Ct. 661 (1970) (induction without hearing as punishment for draft delinquency).

None of the authorities relating to attorneys' fees in civil contempt proceedings (p. 12) is pertinent to the question of the power of a court to punish a trial attorney "for objectionable trial strategy," without according him an evidentiary hearing as to disputed factual issues.

None of the statutes cited (p. 11) is pertinent, for the reasons stated in petition, pp. 28-29. They relate solely to judgments which were affirmed. The judgment against petitioner for attorneys' fees was reversed, and the costs judgment was reduced substantially. (See pp. 4-5, *supra*)

Plaintiff can not simultaneously claim (p. 10) that "this case does not involve civil or criminal contempt," so that this Court's important decision in *Mayberry* v. *Pennsylvania,* No. 121 (1/20/71) ..... U. S. ....., 91 S. Ct. 499, 39 L. W. 4133 and Rule 42, F. R. Cr. P. do not apply, and urge civil contempt authorities (p. 12) as the foundation of the court's summary award of attorneys' fees. Plaintiff has attempted yet another change of theory of this case at the review level, in her attempt to sustain this novel and unprecedented award.

THE COURT'S AWARD OF ATTORNEYS' FEES IS WITHOUT AUTHORITY OR PRECEDENT.

(Answering pp. 12-14).

See pp. 27-29 of the Petition.

The attempt to characterize Hubbard's appeal as frivolous (pp. 12-13) is itself frivolous. As a result of his appeal, the award of $6,100 in attorneys' fees was reversed,

and the award of costs was reduced substantially. An appeal can not simultaneously be "frivolous", and substantially successful.

Nor did the Court of Appeals at any time attempt to justify its award of attorneys' fees against petitioner, on that basis. (A. 23-34) Reese Hubbard, the petitioner, was not the appellate lawyer in this case.

Plaintiff's cited authorities (pp. 12-14) are thus not relevant.

The sole basis of the award of attorneys' fees by Judge Robson, was his claim that Reese Hubbard had engaged in "objectionable trial strategy" requiring retrial of the case. (A. 11-18) That is the very basis, "the attorney's conduct, described previously" of the subsequent allowance of attorneys' fees against Hubbard by the Court of Appeals. (A. 25, 33)

Both awards are thus in direct conflict with this Court's decision in *Fleischmann Corp.* v. *Maier Brewing*, 386 U. S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967).

CONCLUSION.

A short evidentiary hearing at which five people, Butterfield [the reporter], Singleton [the Las Vegas attorneys], Tracy [the operator], petitioner and plaintiff's counsel could have been examined and cross-examined would have resolved the very simple, but important, factual disputes of this case. (See Petition, pp. 8-13, 18-21, 33)

Petitioner is a widely-respected trial lawyer.

He ought as a simple matter of fairness and due process to have been given an evidentiary hearing, before a jury or different judge, to disprove the very serious charges against him.

For the foregoing reasons, certiorari should be granted, and the judgments, $1,741.20 in "costs," $1,860.00 in printing expenses, and $4,000.00 in attorneys' fees should be vacated, reversed and set aside.

Alternatively, petitioner prays that certiorari be granted, that the judgments be vacated, reversed and set aside, and that the cause be remanded for a proper evidentiary hearing.

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